No. 84-1479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

v.

JOSEPH ALLAN WILSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR RESPONDENT

PHILIP S. WEBER
520 Madison Avenue
New York, New York 10022
(212) 888-6550
(Counsel of Record)

IDA C. WURCZINGER
3701 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 363-1761
Counsel for Respondent
JOSEPH ALLAN WILSON

Of Counsel:
JAMES J. NEATH
231 South LaSalle Street
Chicago, Illinois 60604

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

Respondent respectfully submits that the issues presented for review are:

1. Whether the incriminating statements obtained from Wilson by a secret government informant under circumstances indistinguishable from those that were determinative in *United States* v. *Henry*, 447 U.S. 264 (1980), were "deliberately elicited" by the government under the principles of *Henry*? The Court of Appeals answered this question in the affirmative.

2. Whether, in view of the clear violation of Wilson's Sixth Amendment right to counsel under the holding of *Henry*, the ends of justice require a full review of the merits of Wilson's habeas corpus petition? The Court of Appeals answered this question in the affirmative.

PARTIES TO THE PROCEEDING

While the caption of the case in this Court lists the names of all the formal parties in the proceeding, Respondent notes that the State has recently transferred him from the Auburn Correctional Facility to the Clinton Correctional Facility in Dannemora, New York. The superintendent of the Clinton Correctional Facility is therefore the state official who will be affected by this Court's disposition of the case.

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

FURTHER CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Article I, Section 9, Clause 2 provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. United States Code, Title 28, Section 2253 provides in pertinent part:

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

3. United States Code, Title 28, Section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The Court of Appeals for the Second Circuit, reversing the United States District Court for the Southern District of New York, held that the ends of justice required it to entertain Wilson's current habeas corpus petition. The Court of Appeals then held that *United States* v. *Henry*, 447 U.S. 264, an intervening precedent of this Court available neither to the state courts nor to the federal courts that entertained Wilson's first petition for a writ of habeas corpus, controls this case. *Henry* served to establish that Wilson's right to counsel had been denied at his trial under the principles first announced in *Massiah* v. *United States*, 377 U.S. 201 (1964). The Court of Appeals held that *Henry*, because it constituted no clear break with prior law, should be retroactively applied to *Wilson*. Under *Massiah* and *Henry*, Wilson's right to counsel was violated when the government deliberately elicited inculpatory statements from him by creating a situation likely to induce him to make such statements.

This Court should affirm the decision of the Court of Appeals because it correctly determined that Wilson's conviction was unconstitutional under principles insuring the accused's right to counsel under the Sixth Amendment. *Henry* declared that the government may not use a secret cellmate-informant to obtain evidence from a prisoner in the absence of his counsel at a time in the proceedings when it is abundantly obvious that direct interrogation would be prohibited. Nonetheless, Wilson was subjected to the company and blandishments of such an informant. Any prisoner subjected today to the treatment that Wilson received in 1970 could not lawfully be convicted on the basis of the evidence thus obtained. The fundamental concept that a person in confinement is entitled to habeas corpus relief when he has been unconstitutionally convicted impelled the Court of Appeals to rule that Wilson be released unless the State elects to retry him. The State offers no reason why, under current, applicable law, this Court should not affirm that judgment.

A. The Crime, Wilson's Arrest, and His Arraignment.

On July 4, 1970, an armed robbery of the Star Taxicab Garage in Bronx County, New York was committed during which the on-duty dispatcher was shot and killed. From photographs, three witnesses later identified Wilson, a former Star employee whose brother was still employed there, as being at the garage before the time of the robbery. Two of the three also testified to having seen Wilson after the incident running from the garage and carrying some money. (Hearing and Trial Transcript ("Tr.") at 328, 464.) The police promptly commenced a search for Wilson. (Tr. at 354-356.)

Aware that the police were looking for him, Wilson surrendered to the police on July 8. Accompanied by his brother, Wilson first went to the 42nd Detective Squad. Wilson and his brother were sent unescorted to the 44th Detective Squad where Wilson turned himself over to Detectives Cullen and Dunn. Cullen immediately arrested Wilson. (Joint Appendix ("J.A.") at 9-12.)

After receiving *Miranda* warnings (J.A. at 14-15), Wilson told Detective Cullen that, while looking for his brother, he

came upon the scene of the crime and witnessed the robbery and shooting. Wilson said that he heard the shots and saw the dispatcher's body on the floor. Wilson told Cullen that he had not participated in the robbery, but fled because he was afraid of being blamed. (J.A. at 19-20.) Wilson was placed in a detention cell in the police station overnight. (J.A. at 22-23.) The next day, July 9, 1970, counsel was assigned to represent him and he was arraigned. Wilson was then sent to the Bronx House of Detention.

B. The State's Enlistment and Use of a Secret Informant.

On July 7, 1970, the day before Wilson's voluntary surrender, Detective Cullen met with Benny Lee, an inmate of the Bronx House of Detention whom Cullen had known for five years and previously employed as an informant. He told Lee that he was investigating the crime at the Star Taxicab Garage, which he described. He showed Lee a photograph of Wilson, saying that he expected imminently to arrest Wilson as a suspect. (J.A. at 24-25.)

Detective Cullen asked Lee whether he knew Wilson and whether there was anything that Lee could do to help him with the case. (J.A. at 36.) Lee said that he had "seen him around" but did not know Wilson very well. (J.A. at 78.) Cullen then told Lee that, after arresting Wilson, he would arrange Wilson's transfer to Lee's cell in the Bronx House of Detention. Cullen asked Lee to "see if [he] could find out" from Wilson the names of the two perpetrators who had escaped identification and apprehension. (J.A. at 24.)

In accordance with the arrangement between Cullen and Lee, Wilson was transferred to Lee's cell in the Bronx House of Detention on July 13, 1970. This cell overlooked the Star Taxicab Garage, the scene of the crime. (J.A. at 80.)

Lee, who was addicted to narcotics (J.A. at 47) and was a three-time offender awaiting sentencing on a plea of guilty to a reduced charge of robbery in the third degree (J.A. at 43), had served as a police informant over 100 times. (J.A. at 95.) At Wilson's trial, defense counsel asked Lee whether he received consideration for informing on Wilson, but failed to elicit a

comprehensible answer. (J.A. at 105.) However, it is certain from Lee's testimony that he was frequently paid for his services as an informant. *Id.*

C. Events Following Wilson's Transfer to Lee's Cell.

Immediately upon his arrival at Lee's cell, Wilson was upset by the view. (J.A. at 38.) His first words to Lee were, "Somebody's messing with me because this is the place I'm accused of robbing." (J.A. at 80.) Wilson told Lee that on the night of July 4, he had gone to the Star Garage to see his brother who worked there. Two men[1] approached him near the front door. He directed them to the soda machine inside the garage, then he walked inside, talked to some people, and bought a soda. Subsequently, Wilson heard two shots and saw two men running out of the dispatcher's office stuffing money into their clothes, dropping some of it. Wilson said that he then picked up some of the money and followed the two men out of the garage and up the street. (J.A. at 38-39.)

Lee told Wilson, "Look, you better come up with a better story than that because that one doesn't sound too cool to me." (J.A. at 81.) Although Lee testified that he did not question Wilson, there can be no doubt that Lee provoked Wilson to discuss the crime of which he was accused. (J.A. at 39, 81.) Lee followed his instructions to find out, not only the identity of the two unknown suspects, but anything Wilson had to say about the crime. (J.A. at 62.) Over the next few days, Lee and Wilson "talked about different people in the street" and, under prodding from Lee, Wilson eventually altered the description of the events that he had first given. (J.A. at 81-82.) Wilson also received a visit from his brother, who told him that his family was agitated by the shooting, but there is no testimony that this visit *caused* Wilson to alter his version of the events of July

[1] Other witnesses also saw the two men and described them to the police but were unable to identify them. They were never apprehended.

4.[2] To the contrary, it was over the course of several days when, according to Lee, Wilson eventually claimed to have acted with the two unidentified men. (J.A. at 39-40.)

Wilson and Lee spent about nine or ten days together in the cell overlooking the Star Taxicab Garage. (J.A. at 81.) Lee made some notes during that time (and some much later), not revealing the identity of the two fleeing perpetrators, but supposedly capsulizing what Wilson said about the crime. (J.A. at 62.) On July 24, 1970, Detective Cullen again met with Lee at the Bronx House of Detention. Lee told Cullen that Wilson had admitted to participating in the planning and execution of the crime. (J.A. at 84.) At this meeting, Lee turned over pages on which he had made notations of "things that [he] thought would be of help to Detective Cullen." (J.A. at 99.)

Wilson, who was subsequently indicted and charged with murder and felonious possession of a weapon, moved to suppress Lee's testimony. A pretrial hearing was held pursuant to *People* v. *Huntley*, 15 N.Y.2d 72 (1965). The state court denied Wilson's suppression motion on the grounds that Lee had not "interrogated" Wilson. (J.A. at 63.) The court determined that "spontaneous" and "voluntary" utterances are admissible on the basis of two New York cases involving defendants who volunteered statements. (J.A. at 62.) It did not rely on *Massiah* v. *United States*, 377 U.S. 201 (1964). As a consequence of the state court's decision, Lee's account of his conversations with Wilson and Lee's notes were admitted into evidence at trial in the State's case against Wilson. The record shows that neither at the *Huntley* hearing, nor at trial, was Lee subjected to cross-examination with respect to facts that were relevant under the existing law of *Massiah* v. *United States*, nor under the yet-to-be-decided law of *United States* v. *Henry*. The con-

[2] The prosecution's question seeking to establish such a causal link met with an objection from defense counsel, which the court sustained. (J.A. at 42.) This supposed connection between the visit of Wilson's brother and the statements Wilson made played no part in the hearing court's decision. (J.A. at 62-63.)

clusion that Lee did not "question" Wilson rests entirely on Lee's unchallenged testimony under direct examination. (J.A. at 39.)

The jury convicted Wilson of both crimes on April 20, 1972, on the testimony of Lee and Detective Cullen and on the circumstantial evidence of the witnesses who testified that they saw him at the scene. No witness testified to having seen Wilson participate in the robbery or shooting.[3] On May 18, 1972, the court sentenced Wilson to a term of twenty years to life for the murder conviction and a concurrent term not to exceed seven years for the weapons conviction. On April 23, 1973, the Appellate Division, First Department, of the Supreme Court of the State of New York affirmed Wilson's conviction. Later, Wilson applied for leave to appeal to the Court of Appeals of the State of New York, which was denied.

D. Wilson's Initial Application for a Writ of Habeas Corpus.

On December 7, 1973, after exhausting his appeals in the courts of the State of New York, Wilson filed a *pro se* application for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming, *inter alia*, that the admission into evidence at his trial of Lee's testimony and notes violated his Sixth Amendment right to counsel. Relying on an erroneous interpretation of *Massiah* v. *United States*, under which the state trial court's finding of "no interrogation" of Wilson controlled the determination of whether his incriminating statements to Lee were deliberately elicited by the government, the District Court, Carter, J., denied his application on January 7, 1977.

On appeal, a panel of the Court of Appeals for the Second Circuit affirmed the District Court's denial of Wilson's habeas corpus petition by a two-to-one vote. *Wilson* v. *Henderson*, 584

[3] The State has never argued below, nor does it argue now, that the circumstantial evidence placing Wilson near the scene of the crime was sufficient to support his conviction. Furthermore, the State has never argued that, if Wilson's statement was erroneously admitted it was a harmless error.

F.2d 1185 (2d Cir. 1978). District Judges Blumenfeld and Mehrtens (both sitting by designation) voted to affirm the District Court's decision and to deny rehearing, while Circuit Judge Oakes voted to reverse. The Court of Appeals divided in denying rehearing *en banc*, with Circuit Judges Mansfield, Oakes, and Gurfein in dissent voting to reconsider the District Court's holding with respect to Wilson's Sixth Amendment claim. *Wilson* v. *Henderson*, 590 F.2d 408 (2d Cir. 1978). In his dissent from the denial of rehearing *en banc*, Circuit Judge Oakes noted that in *Henry* v. *United States*, 590 F.2d 544 (4th Cir. 1978), the Court of Appeals for the Fourth Circuit had recently rendered a holding "directly contrary" to the majority of the panel of the Second Circuit with respect to Wilson's Sixth Amendment claim. *Wilson* v. *Henderson*, 590 F.2d at 409 (Oakes, J., dissenting).

Wilson's petition for certiorari to this Court was denied without opinion. *Wilson* v. *Henderson*, 442 U.S. 945 (1979).[4]

E. The Inception of Wilson's Current Application for a Writ of Habeas Corpus.

Less than four months after this Court denied certiorari in Wilson's case, it granted certiorari in *United States* v. *Henry*, 444 U.S. 824 (1979).[5] This Court went on to affirm the decision of the Court of Appeals for the Fourth Circuit, which held that the government's evidentiary use of incriminating statements obtained from an indicted, in-custody defendant by his fellow inmate, a secret government informant, violated the accused's Sixth Amendment right to counsel. *United States* v. *Henry*, 447 U.S. 264. Court-appointed counsel for Wilson commenced proceedings in the courts of the State of New York in an unsuccessful effort to obtain relief on the strength of *Henry*. All state court remedies were exhausted as follows: On Sep-

[4] Subsequent federal courts correctly accorded no weight to this denial of certiorari. *Brown* v. *Allen*, 344 U.S. 443, 497 (1953) (Frankfurter, J.).

[5] This Court denied Wilson's petition for certiorari on June 18, 1979 and granted certiorari in *Henry* on October 1, 1979.

tember 11, 1981, Wilson moved the Supreme Court of the State of New York, Bronx County, to vacate his conviction pursuant to New York Criminal Procedure Law § 440.10 (the State's habeas corpus statute) on the ground that *Henry* established that his conviction had been obtained in violation of his Sixth Amendment right to counsel. The motion was denied by order dated November 20, 1981. The Appellate Division of the Supreme Court, First Department, denied Wilson's motion for leave to appeal the November 1981 order on January 19, 1982.

On July 6, 1982, Wilson brought his current petition for a writ of habeas corpus to the United States District Court for the Southern District of New York on the ground that his Sixth Amendment right to counsel had been violated. In this petition, Wilson demonstrated that the test this Court promulgated in *Henry* and all relevant considerations supported the application to his case of the principles of earlier announced in *Massiah*. The District Court, Gagliardi, J., denied Wilson's petition by opinion and order dated March 30, 1983.

The District Court interpreted *Henry* to require evidence of an "affirmative effort on the part of [the informant] to elicit" incriminating statements from the accused. (Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("Cert. Petition"), Appendix C, at 28a.) It noted its agreement with that part of Justice Powell's concurring opinion in *Henry*, 447 U.S. at 276, in which the Justice interpreted the majority's holding to require that "the informant's actions constituted deliberate and 'surreptitious interrogatio[n]' of the defendant." (Cert. Petition, Appendix C, at 29a.) The District Court distinguished *Wilson* from *Henry*, noting that Lee had not made an "affirmative effort" to question Wilson. Because of its holding that Wilson's case was distinguishable from *Henry*, the District Court did not decide whether the holding of *Henry* should be retroactively applied to this case.

F. Wilson's Appeal from the District Court's Denial of His Current Application.

On May 8, 1983, Wilson moved the District Court for the Southern District of New York for a certificate of probable

cause to appeal to the Court of Appeals for the Second Circuit the denial of his petition for habeas corpus. The District Court, Gagliardi, J., denied the motion, issuing a Memorandum Endorsement on May 12, 1983 to the effect that the "retroactivity" issue deserved appellate attention, but could not be appealed because the District Court had not reached it, having found *Wilson* distinguishable from *Henry*.

Wilson then moved the Court of Appeals for the Second Circuit for a certificate of probable cause, by a notice of motion dated June 10, 1983. A panel comprising Chief Justice Feinberg and Circuit Judges Oakes and Pierce granted the certificate of probable cause on December 14, 1983. In doing so, the panel also implicitly rejected the State's argument that Wilson's second petition for a writ of habeas corpus should not be entertained under 28 U.S.C. § 2244(b).

Another panel of the Court of Appeals for the Second Circuit heard argument of the appeal on April 5, 1974. This panel consisted of Circuit Judges Timbers, Van Graafeiland, and Cardamone. The majority of the panel reversed the District Court in a decision rendered on August 27, 1984. *Wilson* v. *Henderson*, 742 F.2d 741 (2d Cir. 1984). The Court of Appeals held that, under *Henry*, the government had deliberately elicited incriminating statements from Wilson in violation of his Sixth Amendment right to counsel. 742 F.2d at 745.

The Court of Appeals also held that *Henry* established no new rule that would preclude its retrospective application. Accordingly, the holding of *Henry* applied to Wilson's case, even though Wilson's conviction occurred before *Henry* was decided. 742 F.2d at 747. Recognizing that *Henry* is fully applicable to *Wilson*, the court held that Wilson's conviction on the basis of incriminating statements elicited by the government through a secret jailhouse informant necessarily trampled his Sixth Amendment right to counsel, and ordered that Wilson be released from custody unless the State elects to try him anew. 742 F.2d at 748.

SUMMARY OF THE ARGUMENT

Wilson was convicted on the basis of evidence obtained in the absence of his counsel in a manner that this Court has recog-

nized to be unconstitutional in *United States* v. *Henry*, 447 U.S. 264 (1980). The Court of Appeals granted relief to Wilson holding that *Henry* constitutes an applicable precedent, and recognizing that the federal courts that considered Wilson's prior application did not have the learning of *Henry* before them. Even though a court may decline to entertain a second petition for habeas corpus, the Court of Appeals decided to entertain Wilson's current petition because the intervening decision of *Henry* led it to conclude that the ends of justice would thus be served.

In reaching this conclusion, the Court of Appeals acted in accordance with *Sanders* v. *United States*, 373 U.S. 1 (1963), where this Court held that a federal court may decline to entertain a successive petition only if a further review of the petitioner's claim would not serve the ends of justice. The ends-of-justice analysis is inherent in the statute that codified the principles of *Sanders* for state prisoners, 28 U.S.C. § 2244(b), even though the words "ends of justice" do not appear there. This is evident from the discretionary language used in the statute, its legislative history, and its treatment by this Court and the lower federal courts. In order to justify its argument that the Court of Appeals should be reversed, the State has proposed grafting a preclusive rule onto the judicial and statutory framework described by *Sanders* and § 2244(b), which would effect a change not sanctioned by Congress or practice, and probably is in derogation of the privilege of the writ of habeas corpus guaranteed in the United States Constitution. (Article I, § 9, cl. 2.) Because the State's proposed preclusive rule lacks any support in existing law, this Court should refuse to embrace it.

The decision of the Court of Appeals to hear Wilson's claim served the ends of justice even if Wilson's current petition offers no "new ground" for relief under *Sanders* other than the intervening decision of *Henry*. *Henry* is an applicable, indistinguishable precedent of this Court with a direct bearing on Wilson's claim; this supports a review by the federal courts of a successive petition for habeas corpus. *Henry* also illuminates the error of the courts that previously entertained Wilson's

claim, holding that when the government creates a situation likely to induce the accused to make an inculpatory statement, the introduction at trial of the evidence thus obtained constitutes a violation of the accused's right to counsel. At the very least, *Henry* provides a "differential basis" on which to examine Wilson's Sixth Amendment claim that, under the practice of the lower federal courts, justifies the court in entertaining Wilson's current petition.

The record of this case fully supports the decision of the Court of Appeals to grant relief to Wilson in light of *Henry*. The record shows that the state trial court found that Wilson was not interrogated, but that court drew the wrong legal conclusion, as *Henry* now makes plain, because the lack of interrogation is not determinative under the correct constitutional standard. The State argues that Wilson's case is distinguishable from *Henry*. The State bases this contention on a slavish reading of the decision of the New York State trial court, which reached its factual and legal conclusions before *Henry* was decided and without reference to existing federal constitutional precedents. Under *Henry*, it is apparent that the state trial court should have inquired whether the government created a situation likely to induce Wilson to confess. This Court held that the facts of *Henry* revealed such a situation; the facts of *Wilson* make an even stronger case that the government deliberately elicited an inculpatory statement from Wilson.

The Court of Appeals concluded that *Henry* and *Wilson* are indistinguishable on the facts, and that this entitles Wilson to relief. The Court of Appeals differed from the state trial court in its conclusions regarding a mixed question of law and fact, but that difference is appropriate notwithstanding 28 U.S.C. § 2254(d), which requires the federal court to defer to the state court only on matters of historical fact. The Court of Appeals need not have deferred to those parts of the state trial court's decision in which it concluded that Wilson's right to counsel was not denied, because that is a mixed determination of law and fact. Here, the Court of Appeals based its holding on the factual record but came to a different conclusion than the prior courts because it applied the correct, rather than an erroneous,

constitutional standard. Moreover, in arriving at its determination, the Court of Appeals was not bound by the decisions of those other courts that applied the wrong legal standard, gave undue weight to certain aspects of the record, and drew erroneous conclusions.

ARGUMENT

I. The Court of Appeals Properly Discharged Its Duty to Hear Wilson's Current Application for a Writ of Habeas Corpus

The State devotes most of its argument to persuading this Court that the appropriate disposition of Wilson's current petition is a summary dismissal under 28 U.S.C. § 2244(b). Neither the District Court nor the Court of Appeals accepted the State's argument. In the District Court, the State argued that *Henry* did not change the law, and "[t]he present petition should therefore be dismissed pursuant to 28 U.S.C.A. § 2244(b). . . ." (State's Memorandum of Law in Opposition to Wilson's Application, at 6.) The District Court implicitly rejected this approach when it entertained Wilson's claim.[6]

In the Court of Appeals, the State argued, without specifically citing 28 U.S.C. § 2244(b) but relying on *Sanders* v. *United States*, 373 U.S. 1 (1963), that "this Court should accord controlling weight to its prior determination and should reject appellant's present claim without any further consideration of its merits." The two different panels of the Court of Appeals that examined Wilson's case refused summarily to dismiss it. First, the three judges that granted Wilson's motion for a certificate of probable cause recognized in Wilson's claim a potentially meritorious appeal deserving of review. The certificate obliged the Court of Appeals to review the District Court's rejection of Wilson's application. *Barefoot* v. *Estelle*, 463 U.S. 880, 888 (1983) ("if an appellant persuades an appropriate

[6] In the context of § 2244(b), a federal district court "entertains" a habeas corpus application when, after examining it and the accompanying papers, the court concludes that a hearing on the legal or factual merits is proper. *Brown* v. *Allen*, 443 U.S. 433, 461 (1953).

tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits"), *citing Garrison* v. *Patterson*, 391 U.S. 464, 466 (1968). Second, the majority of the panel that considered Wilson's appeal and reversed the District Court fully addressed the State's finality argument and dispensed with it: "The State urges that there must be an end to litigation on Wilson's claim. This argument will hardly halt the inexorable rising and falling of the legal tides." *Wilson* v. *Henderson*, 742 F.2d at 743.[7]

A. The Rule the State Proposes Is Unfounded.

The District Court entertained Wilson's application and the Court of Appeals heard Wilson's appeal in accordance with established practice under this Court's precedents and the applicable statutory rules governing the maintenance of successive habeas corpus petitions. In *Smith* v. *Yeager*, 393 U.S. 122, 125 (1968) (per curiam), this Court held that a state prisoner was entitled to bring a second petition for habeas corpus when an intervening decision of the Court made it plain that one aspect of his first application, his right to an evidentiary hearing, had previously been judged by the wrong constitutional standard. There the Court cited both *Sanders* v. *United States* and 28 U.S.C. § 2244(b). As the Court's ruling in *Smith* v. *Yeager* establishes, the State's proposal to curtail the discretion and jurisdiction of the federal courts to hear successive habeas corpus petitions is groundless, relying on an incorrect interpretation of *Sanders* and § 2244(b).

The federal courts' jurisdiction over an application for a writ of habeas corpus arises from a state prisoner's allegation of unconstitutional confinement. 28 U.S.C. § 2254(a); *Brown* v. *Allen*, 344 U.S. 443, 461 (1953) (opinion of the Court). The federal habeas corpus jurisdiction is marked by wide power, initially received by the common law, later enlarged by Con-

[7] Circuit Judge Van Graafeiland, dissenting, disagreed with the majority's decision to exercise its discretion under the principles set forth in *Sanders* v. *United States*. *Wilson* v. *Henderson*, 742 F.2d at 748-749.

gress, and expansively interpreted by this Court over the course of time. *Developments in the Law*, 83 Harv. L. Rev. 1038, 1272-1273 (1970). In *Fay* v. *Noia*, 372 U.S. 391 (1963), this Court canvassed the development of the writ of habeas corpus and held that if the petitioner's imprisonment is constitutionally intolerable, the petitioner is entitled to relief.[8] 372 U.S. at 414-415. The Court's language, explaining the historical dimensions of the writ, remains as commanding today as it was twenty-three years ago. "[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." 372 U.S. at 424.

The State urges this Court now to adopt a rule that is inimical to the very nature of the habeas corpus remedy[9] and in opposition to its historical development:

> . . . a federal court *must consider itself without discretion* to reconsider an identical claim already fully litigated by the state prisoner on the merits, in a prior federal habeas action, because the "ends of justice" *can never warrant* such an unreasonable and unnecessary perpetuation of the non-finality of a state criminal conviction.

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[8] In *Wainwright* v. *Sykes*, 433 U.S. 72, 87-88 (1977), the Court restricted the applicability of habeas corpus relief in cases where the petitioner has failed to satisfy a state procedural rule, trimming certain dictum of *Fay* v. *Noia* that would have extended the right of state prisoners to challenge their convictions by raising federal contentions not raised below in violation of the state rule. The Court left intact the right of the state prisoner to challenge his conviction on the basis of federal contentions incorrectly decided by the state court. *Id.*; *see also Brown* v. *Allen*, 344 U.S. at 462-464.

[9] "*[H]abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank* v. *Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

Petitioner's Brief at 11 (emphasis added). What the State characterizes as a "generally firm" or "generalized rule of issue preclusion" would be, in effect a *per se* rule,[10] one that the State has devised without reference to existing law. It suffers from several fundamental infirmities, any one of which is fatal. First, it contravenes and misconstrues this Court's principal precedent governing successive habeas corpus petitions; second, it would yield a result directly contrary to 28 U.S.C. § 2244(b) and at odds with this statute's legislative history; and third, it unjustifiably restricts the guarantee of the privilege of habeas corpus found in the Suspension Clause.

1. The State's Proposed Rule Contravenes *Sanders*.

The chief precedent governing successive habeas corpus petitions is *Sanders* v. *United States*, which, as the State concedes, is adverse to its proposed rule. (Petitioner's Brief at 11.) *Sanders* established that:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

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[10] *See Woodard* v. *Hutchins*, 464 U.S. 377, 383 (1984) (White and Stevens, JJ., dissenting). In *Hutchins*, the Court vacated a stay of execution because the prisoner made no attempt to explain why he had not earlier raised his habeas corpus claim. Justices White and Stevens pointed out that the Court's approach "comes very close to a holding that a second petition for habeas corpus should be considered as an abuse of the writ and for that reason need not be otherwise addressed on the merits. *We are not now prepared to accept such a per se rule.*" *Id.* (emphasis added). This Court previously rejected, for the purposes of habeas corpus, the rule of "law of the case," which is another way of saying "issue preclusion." *Davis* v. *United States*, 417 U.S. 333, 342 (1974). There, the Court noted that a prior determination on direct review, as well as a prior determination on a habeas corpus petition, did not bar a petitioner from seeking relief on the strength of an intervening precedent.

373 U.S. at 15.[11] The Court arrived at this conclusion not only as an interpretation of 28 U.S.C. § 2244 (1948), but as a crystallization of "the *judicial and* statutory evolution of the principles governing successive applications. . . ."[12] *Id.* (emphasis added). The *Sanders* Court observed that § 2244 itself was merely a codification of what had gone before, that the codification of § 2244 "was not intended to change the law as judicially evolved," and that it did not enact a rigid rule. 373 U.S. at 11-12.

The "three-pronged test" (Petitioner's Brief at 18) of *Sanders* provides guidance for the lower federal courts. 373 U.S. at 15. In the case of a successive petition that is not patently meritless, the lower court may dismiss the petition summarily *only if* all three prongs of the test are satisfied. The third prong is satisfied if "the ends of justice would not be served" by the court's entertaining the petition, and clearly contains a discretionary component: "the test is 'the ends of justice' and it cannot be too finely particularized." 373 U.S. at 17. In conformity with prior law, the Court left open to the sound judicial discretion of the lower courts the resolution of cases where the petitioner asks the Court to revisit a claim rooted in the same

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[11] This standard applies only to cases that have some apparent merit. *Id.* The State has never contended that this petition should be dismissed at the threshold as being obviously without merit.

[12] The State's contention that *Sanders* was solely an exercise in statutory interpretation (Petitioner's Brief at 18) is therefore incorrect. Moreover, the *Sanders* test is directly relevant to state prisoners petitioning for habeas corpus. While *Sanders* involved a proceeding under 28 U.S.C. § 2255, the principles governing successive applications for relief are the same with respect to federal and state prisoners. 373 U.S. 14-15; *see also Kaufman* v. *United States*, 394 U.S. 217, 227 (1969) (the scope of collateral attack is the same in federal habeas corpus cases involving challenges to state convictions as it is in § 2255 cases except with respect to the presumption regarding federal fact-finding procedures). Finally, the State's sidelong reference to the above-quoted language as "dictum" (Petitioner's Brief at 11) is a plain attempt to disparage the central teaching of the case, which is diametrically opposed to the State's current proposal.

"ground" as an earlier petition. *See Salinger* v. *Loisel*, 265 U.S. 224, 231 (1924) (disposal of a successive petition for habeas corpus lies in the discretion of the federal court to consider "whatever has a rational bearing on the propriety of the discharge sought"). Thus, the *Sanders* Court said: "If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law *or some other justification* for having failed to raise a crucial point or argument in the prior application." 373 U.S. at 17 (emphasis added). Within this language is a component of discretion in deciding *what* serves the ends of justice, as well as the completely separate and long-recognized element of discretion to decide *whether* to hear the petition in any event. *See Brown* v. *Allen*, 344 U.S. at 464 (the federal court must exercise at least a limited jurisdiction at the outset to decide whether to hold a hearing); *Price* v. *Johnston*, 334 U.S. 266, 284 (1948); Petitioner's Brief at 24 ("recognizing that the 'need not entertain' language of section 2244(b) is suggestive of a residual, discretionary power in the federal courts to reconsider an identical claim . . .").

Since the federal court is permitted to decline to entertain a petition for habeas corpus only if the ends of justice will not be served, it follows that it is forbidden so to decline if the ends of justice would be served by a review. The State's proposed rule turns this on its head by requiring the court to deny the petition. Instead, the rule is, as it should be, that when the ends of justice warrant a review of a successive petition, the federal court has a duty to undertake it.[13]

Sanders has continued to be the leading case setting forth the standards governing successive habeas corpus petitions.

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[13] "Thus, for example, if on a subsequent application for habeas corpus relief a State court prisoner asserts that he has newly discovered evidence relating to an alleged denial of a Federal right, the *court would be obliged to entertain* the writ provided it was satisfied that the prisoner had not . . . abused the writ." S. Rep. No. 1797, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3663, 3664 (relating to the enactment of 28 U.S.C. § 2244(b) (1966) (emphasis added)).

As recently as 1983, this Court cited *Sanders* as direct support for Rule 9(b) of the Rules Governing Cases and Proceedings under § 2254, which codifies the learning of *Sanders*. *Barefoot* v. *Estelle*, 463 U.S. at 895; *see* Advisory Committee Note, Rule 9(b), 28 U.S.C.A. foll. § 2254, at 1138 (1977), *quoting Sanders*, 373 U.S. at 15 (the "three-pronged test"); *see also Rose* v. *Lundy*, 455 U.S. 509, 521 (1982) (citing *Sanders* as the basis for Rule 9(b), particulary with respect to its abuse-of-the-writ principles). There is nothing in this Court's subsequent jurisprudence, nor that of the lower federal courts, to cast doubt on the vitality of *Sanders*, including the ends-of-justice language inherent in its three-pronged test.

Perhaps the first suggestion anywhere that the ends-of-justice analysis is "outmoded" and "statutorily unjustified" comes from the State in this case. (Petitioner's Brief at 23.) Except for the argument, refuted below (see *infra*, § IA2), that Congress changed the *Sanders* test for state prisoners when it enacted 28 U.S.C. § 2244(b), the State provides no authority for its assertion that *Sanders* is "no longer applicable" (Petitioner's Brief at 23) to the extent that it mandates the ends-of-justice analysis.

The State attempts to analogize its proposed summary preclusion rule to the rule of *Stone* v. *Powell*, 428 U.S. 465 (1976). (Petitioner's Brief at 25.) However, *Stone* v. *Powell* is not applicable to this case. In *Henry* this Court implicitly rejected, for purposes of decisions following the Sixth Amendment principles of *Massiah*, the *Stone* v. *Powell* "balancing" approach suggested in the dissent. *See* 447 U.S. at 296 (Rehnquist, J., dissenting).[14] Since then, the central purpose of the *Stone* v. *Powell* approach in Fourth Amendment cases has been distinguished from the approach appropriate in Fifth or Sixth

[14] Moreover, the question of whether the bar of *Stone* v. *Powell* should apply to habeas corpus petitions raising Sixth Amendment claims is not among the issues before this Court, and is one upon which the Court has recently declined to express an opinion when it was not an issue presented. *Nix* v. *Williams*, 467 U.S. 431, 104 S.Ct. 2501, 2512 n. 7 (1984).

Amendment cases, as follows: "Many Fifth and Sixth Amendment claims arise in the context of challenges to the fairness of a trial or to the integrity of the factfinding process. In contrast, Fourth Amendment claims uniformly involve evidence that is 'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.'" *Brewer* v. *Williams*, 430 U.S. 387, 414 (1977) (Powell, J., concurring). Because "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 241 (1973), the considerations applicable to the latter should not be imported here, where Wilson complains of a violation of his right to counsel.[15]

2. The State's Proposed Rule Conflicts with § 2244(b).

The State's principal argument for eliminating the ends-of-justice prong of *Sanders* is that when, in 1966, Congress amended 28 U.S.C. § 2244 (1948), it added § 2244(b) specifically governing prisoners under state sentence without alluding to the "ends of justice." This amendment does not, however, provide that a federal court may not undertake a review of the merits of a successive habeas corpus petition when the ends of justice warrant it. On its face, the language of § 2244(b) merely pretermits a basis for *declining*[16] to entertain a successive

[15] The right to the assistance of counsel at the critical stages of the criminal proceeding affects the determination of truth, for "denial of the right must almost invariably deny a fair trial." *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967); *see also Arsenault* v. *Massachusetts*, 393 U.S. 5, 6 (1968); *Tehan* v. *United States*, 382 U.S. 406, 416 (1966). Thus, the danger of releasing an "obviously guilty" defendant (Petitioner's Brief at 12) is not one typically present in a Sixth Amendment case, nor, Wilson submits, is it present here.

[16] For this reason the "ends-of-justice" element of the test is not a "loophole" allowing the Court to take jurisdiction irresponsibly, as the State contends (Petitioner's Brief at 21), but a requirement that a court have a thoughtful reason for dismissing a petition. The State has suggested no reason to believe that the district courts wish to entertain more successive habeas corpus petitions than absolutely necessary. Thus there is no need for a rule restraining the district court's jurisdiction when they already have the appropriate guidance from *Sanders* and § 2244(b).

petition: "a subsequent application for a writ of habeas corpus . . . *need not* be entertained by a court of the United States. . . ." 28 U.S.C. § 2244(b) (emphasis added). For this reason, the State's conclusion (that a federal court must dismiss the petition) is wrong even if, as the State suggests, the three-pronged test of *Sanders* was shorn of one prong in 1966. The State's proposal ignores the layer of discretion that would be left in the *Sanders* test even if the required ends-of-justice analysis were excised. This discretion is evident in the language of § 2244(b), following *Sanders*, which allows summary dismissal in certain cases, but never mandates it. In other words, the language of § 2244(b) undeniabiy leaves intact the Court's discretion on the issue of *whether* to entertain the petition. *Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1152 (1970) ("the habeas judge still has discretion to permit an application when the 'ends of justice' require it" notwithstanding the language absent from § 2244(b)).

Congress did not intend, in 1966, to put an end to the authority of the federal courts to undertake an ends-of-justice analysis. There is nothing in the legislative history of § 2244(b) to establish a link, as the State suggests (Petitioner's Brief at 19-20), between the enactment of § 2244(b) without the ends-of-justice language and Congress's expressed intent to introduce "a qualified application of the doctrine of res judicata" to state habeas corpus litigation. S. Rep. No. 1797, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3663, 3664. The quoted statement apparently refers to the enactment of subsection (c), which does introduce a degree of finality, not found in *Sanders*, for cases that have actually been previously adjudicated by the Supreme Court. Note, *Amendments to Habeas Corpus Act*, 45 Tex. L. Rev. 592, 595 (1967). Subsection (b) introduces no new element, qualified or otherwise, of *res judicata*.[17]

[17] *Fay* v. *Noia* confirmed "the familiar principle that *res judicata* is inapplicable in habeas proceedings." 372 U.S. at 423; *see also Allen* v. *McCurry*, 449 U.S. 90, 98 n. 12 (1980); *Preiser* v. *Rodriguez*, 411 U.S. 475, 497 (1973); *Sanders* v. *United States*, 373 U.S. at 7 ("At common law, the denial by a court or judge of an application for habeas corpus was not *res judicata*"); *Salinger* v. *Loisel*, 265 U.S. 224, 230 (1924). The doctrine of collateral estoppel also does not limit habeas corpus proceedings. *See, e.g., Hardwick* v. *Doolittle*, 558 F.2d 292, 295 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978). The State's proposed rule would import strict principles of *res judicata* into the federal courts' consideration of successive habeas corpus petitions when this Court has consistently held such principles to be alien to the writ.

Accordingly, Congress's enactment of 28 U.S.C. § 2244(b) did not tip the scales in favor of the finality of state court convictions over the substantial rights of the applicant, or even place these competing considerations on an equal footing.[18] Rather, Congress intended to equip the federal courts with the means to deal summarily with certain blatant abuses of the habeas corpus process while perpetuating the principle announced in *Sanders* that the federal courts have a duty to conduct a full review of a successive habeas corpus petition if the ends of justice would be served. 373 U.S. at 18-19; *see also Neil* v. *Biggers*, 409 U.S. 188, 191 (1972) ("§ 2244(b) shields against senseless repetition of claims by state prisoners without endangering the principle that each is entitled, other limitations aside, to a redetermination of his federal claims by a federal court on habeas corpus").

The legislative history of Rule 9(b) of the Rules Governing Cases and Proceedings under 28 U.S.C. § 2254, enacted ten years after 28 U.S.C. § 2244(b), confirms the vitality of the *Sanders* principle. *See* H.R. Rep. No. 1471, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 2478, 2481-82 (citing *Sanders* v. *United States* and 28 U.S.C. § 2244(b)). The Advisory Committee also made clear that in 1976 the three-pronged test of *Sanders* was intact. First, in its notes accompanying Rule 9(b), the Committee quoted the test

[18] Congress was, in fact, assured that the proposed amendment "safeguards all the substantial rights of the applicant for the writ." S.Rep. No. 1797, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S.Code Cong. & Ad. News 3663, 3667 (letter of Orie L. Phillips, C.J., to Joseph D. Tydings, U.S. Senator).

including the ends-of-justice language.[19] Advisory Committee Note, Rule 9(b), 28 U.S.C.A. foll. § 2254, at 1138 (1977). Then it observed: "*Sanders*, 28 U.S.C. § 2244, and subdivision (b) [of Rule 9] make it clear that the court has discretion to entertain a successive application," and further, "Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled." *Id.* at 1139.

All this evidence of legislative intent shows that, both in 1966 and in 1976, Congress meant to follow *Sanders* with respect to state prisoners, not to overrule it as the State contends. As the State itself notes, the federal courts have acted according to the holding of *Sanders*, and continue to apply the ends-of-justice analysis to successive petitions of state prisoners in a practice this Court has recently acknowledged. *Antone* v. *Dugger*, 465 U.S. 200 (1984) ("The [district] court concluded that the 'ends of justice' would not be served by reconsideration of the claims that had been raised on the first petition for habeas corpus." 465 U.S. at 204. "Nor has applicant shown any basis for disagreeing with the finding of the District Court and the Court of Appeals that the ends of justice would not be served. . . ." 465 U.S. at 206).

The universal practice in the Courts of Appeals has been to treat the *Sanders* test, specifically including the ends-of-justice analysis, as coextensive with the provisions of § 2244(b) and Rule 9(b). *Miller* v. *Bordenkircher*, 764 F.2d 245, 249 (4th Cir. 1985) ("This test is essentially the same as that now codified in Rule 9(b)"); *Raulerson* v. *Wainwright*, 753 F.2d 869, 874 (11th Cir. 1985) (the Rule would "bar reconsideration of this claim unless Petitioner can establish that the ends of justice would be served"); *Walker* v. *Lockhart*, 726 F.2d 1238, 1242 (8th

[19] The State notes that the Advisory Committee quoted the language of *Sanders*'s three-part test, and then states that there is no "suggestion" that the ends-of-justice requirement "survived." (Petitioner's Brief at 20-21, footnote.) The Committee's quotation of the full test, with the ends-of-justice language, would seem to be suggestion enough of its vitality.

Cir.), *cert. dismissed*, 105 S. Ct. 17 (1984) ("The general effect of rule 9(b) and section 2244(b) is to codify the criteria outlined in *Sanders*"[20]); *Sinclair* v. *Blackburn*, 599 F.2d 673, 675 (5th Cir. 1979), *cert. denied*, 444 U.S. 1023 (1980); *St. Pierre* v. *Helgemoe*, 545 F.2d 1306, 1308 (1st Cir. 1976) ("Congress implicitly assumed that the rule in *Sanders* would survive" despite the enactment of § 2244(b) without the ends-of-justice language); *United States ex rel. Townsend* v. *Twomey*, 452 F.2d 350, 355 (7th Cir. 1971), *cert. denied*, 409 U.S. 854 (1972); *Cancino* v. *Craven*, 467 F.2d 1243, 1246 (9th Cir. 1972) (the denial of the second petition on the basis of the denial of the first, pursuant to § 2244(b), was "erroneous because the third condition of *Sanders* was not met"); *United States ex rel. Schnitzler* v. *Follette*, 406 F.2d 319, 321 (2nd Cir.), *cert. denied*, 395 U.S. 926 (1969) (the Supreme Court defined the discretion of the district courts in *Sanders* in terms applicable to cases governed by § 2244(b)). Apparently, no court has cast serious doubt on the correctness of giving due regard to the ends of justice when deciding whether to review a successive habeas corpus petition.[21]

3. The State's Proposed Rule Unjustifiably Restricts the Privilege of Habeas Corpus.

Another fatal difficulty for the State's proposed rule is that it runs afoul of the Suspension Clause, which provides: "The

[20] The court assumed the ends-of-justice test had been incorporated. *Id.* Even without it, the court noted, "substantial discretion remains in the federal courts." *Id.* note 10.

[21] The State's contention that the enactment of § 2244(b) without the ends-of-justice language has caused "confusion" (Petitioner's Brief at 22) is quite overstated. It has occasionally caused the courts to pause to consider the statutory language. Petitioner cites two decisions of Courts of Appeals that confronted the statutory language of § 2244(b) and concluded that Congress intended not to interfere with the power of the federal courts to consider the second habeas corpus petition when the ends of justice require it. *Walker* v. *Lockhart*, 726 F.2d at 242 n. 10; *St. Pierre* v. *Helgemoe*, 545 F.2d at 1307-1308. The commentators, including those petitioner cites, agree. (Petitioner's Brief at 22.)

Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." United States Constitution, Article I, § 9, cl. 2. In *Sanders*, this Court commented on the enactment of the original 28 U.S.C. § 2244 (1948), observing that Congress deliberately conformed it to the dimensions of the writ of habeas corpus at common law: "Moreover, if construed to derogate from the traditional liberality of the writ of habeas corpus, . . . § 2244 might raise serious constitutional questions" under the Suspension Clause. 373 U.S. at 11-12. The *Sanders* Court also drew attention[22] to the proposition in *Fay* v. *Noia* that "the Constitution invites, if it does not compel, . . . a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice." 372 U.S. at 406; *see also Brown* v. *Allen*, 344 U.S. at 498-499 (Frankfurter, J.) (it would be "an abuse to deal too casually and too lightly" with the federal rights enforceable through the habeas corpus jurisdiction of the district courts).

None of the State's arguments indicates a firm congressional determination to diminish the common-law scope of the writ by enacting § 2244(b) and, by so doing, to tread very close to, if not beyond, the limit of what the Suspension Clause will allow. *See Brown* v. *Allen*, 344 U.S. at 450 (with respect to a suggested interpretation of 28 U.S.C. § 2254 that would have curtailed habeas corpus for state prisoners, the Court was "unwilling to conclude without a definite congressional direction that so radical a change was intended"). The ends-of-justice test "frequently is the most important factor to be considered by a court in determining whether to entertain a subsequent application based on an issue previously determined. Indeed, this requirement is essentially a restatement of the fundamental purpose of habeas corpus." Williamson, *Federal Habeas Corpus: Limitations on Successive Applications from the Same Prisoner*, 15 Wm. & Mary L. Rev. 265, 273-274 (1973). To the extent that such an inquiry is inherent in the writ and may not be within the power of the legislature to foreclose, this Court should not now infer legislative intent without a more explicit direction from Congress.

[22] The Court found precedent indicating that "the Framers' understanding [was] that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ." *Fay* v. *Noia*, 372 U.S. at 406, *citing McNally* v. *Hill*, 293 U.S. 131, 135 (1934) (Stone, J.); *Ex Parte Yerger*, 8 Wall. 85, 95 (1868) (Chase, C.J.).

Moreover, none of the State's arguments concerning the importance of finality provides a basis for this Court to diminish the power, secured by the Suspension Clause, of the federal courts to dispense the writ. Last term, in *Reed* v. *Ross*, 104 S.Ct. 2901 (1984), this Court heard and rejected the argument that the importance of the finality of state court proceedings, without more, should supersede considerations underpinning the writ of habeas corpus.[23] There, the Court said, with respect to the cause-and-prejudice standard[24] imposed in cases where the petitioner failed to comply with a state procedural requirement but later sought habeas corpus relief on the basis of a novel constitutional claim:

> It is true that finality will be disserved if the federal courts reopen a state prisoner's case, even to review claims that were so novel when the cases were in state court that no one would have recognized them. This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.

[23] "Plainly the interest in finality is the same with regard to both federal and state prisoners." *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969). The State's proposal to interject into the habeas corpus scheme differing "notions of finality" for state and federal prisoners rebels against this principle, which is central to the writ. *Id.*

[24] The cause-and-prejudice standard is not applicable here. In any event, that standard would not preclude Wilson's habeas corpus petition. In *Engle* v. *Issac*, 456 U.S. 107, 135 (1982) this Court expressed confidence that "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard. . . ."

104 S.Ct. at 2910; *compare Engle* v. *Issac*, 456 U.S. 107, 128 (1982) ("particularly high" costs to society where prisoner has bypassed a state procedural rule); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 265 (1973) (Powell, J., concurring) ("This case involves only a relatively narrow aspect of the appropriate reach of habeas corpus. . . . the extent to which a state prisoner may obtain federal habeas corpus review of a Fourth Amendment claim"). Accordingly, finality alone is not a policy that outweighs the constitutionally guaranteed privilege of the writ of habeas corpus.

B. It Served the Ends of Justice for the Court of Appeals to Hear Wilson's Current Application.

Citing the often-repeated admonition that conventional notions of finality must yield when there is an allegation of unconstitutional confinement, *Sanders* v. *United States*, 373 U.S. at 8, *Davis* v. *United States*, 417 U.S. 333, 342 (1974), *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969), the Court of Appeals determined that "the 'ends of justice' require a consideration of the merits of [Wilson's] present application."[25] *Wilson* v. *Henderson*, 742 F.2d at 743. The ends-of-justice inquiry necessarily focuses on whether there is some reason for the court to entertain a successive petition that does not present a new ground.[26] Arguably, Wilson's current petition is not

[25] The correctness of the court's decision to entertain Wilson's current petition does not depend on whether Wilson now advances the "same ground," *Sanders* v. *United States*, 373 U.S. at 16, or "substantially the same ground," *Wilson* v. *Henderson*, 742 F.2d at 743, as he did in his prior petition. If Wilson now advances a "different ground," any inquiry into the ends of justice is obviated, and the court must entertain the petition assuming he committed no abuse, as the State concedes. (Petitioner's Brief at 25, footnote.) If Wilson now advances the same ground, then *Sanders* required the court to undertake the ends-of-justice inquiry.

[26] Contrary to the State's argument (Petitioner's Brief at 10-11, a petition that alleges "no new ground," *see Sanders* v. *United States*, 373 U.S. at 16 ("By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant") is not necessarily

based on the same ground as his earlier petition because of the intervening decision of this Court in *United States* v. *Henry*. "Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Sanders* v. *United States*, 373 U.S. at 16. *See St. Pierre* v. *Helgemoe*, 545 F.2d at 1308 (where the Court of Appeals held that an intervening development in the law created a new ground for the petitioner's application).[27]

In *Sanders* this Court offered two examples of instances in which the ends of justice would mandate a review of a petition that alleges no new ground (lack of fairness in finding facts, and, when purely legal questions are involved, a change in the law), although the catalogue was not exhaustive. 373 U.S. at 17. When the issue is one of law, it is open to the applicant to show "some other justification for having failed to raise a crucial point or argument in the prior application." *Id.*

Assuming that Wilson raises no "new ground" under *Sanders*, any one of three bases would justify the ends-of-justice decision of the Courts of Appeals to entertain Wilson's current petition. First, while *Henry* may not have changed the law sufficiently to require an inquiry into the factors governing the retroactivity of a new constitutional rule, *Henry* is a sufficient change in the law to require a reexamination of Wilson's ground for habeas corpus relief. Second, the federal and state courts that reviewed the prior application for relief were plainly in error in light of *Henry*, an intervening, indistinguishable precedent, clarifying the law applicable to Wilson's case. Third, the intervening decision provides a differential basis on which to consider the current petition.

"identical" to the prior petition. Wilson's current application is not identical to his previous petition because he now rests his claim for relief in large part on the strength of *Henry*, which was not previously available.

[27] In *St. Pierre*, the Court of Appeals for the First Circuit further held that an applicant's claim that he is entitled to relief under a significant new decision "is enough to surmount the hurdle of § 2244(b)" because it is a "new ground." 545 F.2d at 1309.

1. *Henry* Was an Intervening Development in the Law Warranting a Review of Wilson's Current Application.

It is abundantly clear from the opinion of the Court of Appeals that its discussion of the "change in the law" was strictly confined to the question of retroactivity.[28] 742 F.2d at 746-747. The State assumes without justification that a "change in the law" for purposes of the ends of justice is the same as a "change in the law" for purposes of retroactivity, and that the determination of the Court of Appeals on the second issue is conclusive as to the former issue. (Petitioner's Brief at 30.) Since the concerns governing the concept of retroactivity are altogether different from those governing the writ of habeas corpus,[29] the concept of a "change" must be different in the two different contexts. *Kaufman* v. *United States*, 394 U.S. at 228-229.

In *Kaufman*, this Court rejected the position "that the weight to be accorded the benefits of finality is as controlling in

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[28] The Court of Appeals correctly held, in a conclusion unchallenged by the State (*see* Petitioner's Brief at 30-31), that since *Henry* did not announce a "new" constitutional principle it perforce applies "retroactively" to cases, such as Wilson's, decided before *Henry*. 742 F.2d at 746-747; *see*, *United States* v. *Johnson*, 457 U.S. 537, 549 (1982); *Robinson* v. *Neil*, 409 U.S. 505, 507-508 (1973). In *Arsenault* v. *Massachusetts*, 393 U.S. 5, 6 (1968) (per curiam) (where this Court granted relief on the basis of a Sixth Amendment decision handed down long after the prisoner's conviction), this Court arrived at the conclusion that the right to counsel is of such importance that relief was automatically called for when a later decision made it manifest that this right had been denied at a critical stage of the proceedings.

[29] There is thus no cause for concern that "the state prisoner who files a successive writ [will be] in a better situation than a first-time habeas petitioner." (Petitioner's Brief at 24, footnote.) In the case of a retroactive rule of law, the first-time petitioner as well as the successive petitioner will enjoy the protections of the decision, irrespective of when the application for relief is made. In the case of a non-retroactive, "new" rule of law, the prisoner would have the benefit of it on collateral attack neither before nor after the date of the decision.

the context of post-conviction relief as in the context of retroactive relief."[30] 394 U.S. at 229. Distinguishing the two, the Court further stated: "collateral relief, *unlike retroactive relief*, contributes to the present vitality of all constitutional rights. . . ." *Id.* (emphasis added). In *Desist* v. *United States*, 394 U.S. 244, 248-249 (1969), decided the same day as *Kaufman*, this Court defined a "new" constitutional rule for the purposes of retroactivity, as one representing "a clear break with the past." There, Justice Harlan separately ventured the observation that "quite different factors" should govern the question of retroactivity of a "new" rule in habeas corpus cases as compared to other kinds of cases. 394 U.S. at 260-261 (dissenting). In *United States* v. *Johnson*, 457 U.S. 537 (1982), the Court later identified three of the situations in which a "new" rule might emerge. First, a decision of this Court may explicitly overrule an existing precedent; second, it may overturn a longstanding and widespread practice approved by near-unanimous lower court authority; and third, it may disapprove a practice arguably sanctioned in prior cases. 457 U.S. at 551.

In contrast, a successive petition for habeas corpus may be maintained on the strength of a less momentous development in the law. *See*, *e.g.*, *Smith* v. *Yeager*, 393 U.S. at 125; *see also* *Alford* v. *North Carolina*, 405 F.2d 340, 343 (4th Cir. 1968), *rev'd on other grounds*, 400 U.S. 25, 39 (1970).[31] Thus, those cases in which the Court develops, clarifies, or modifies the law by applying "settled precedents to new and different factual situations," *United States* v. *Johnson*, 457 U.S. at 549, may

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[30] Justice Black offered this position in his dissenting opinion. There, he nonetheless agreed with the majority that the scope of collateral attack is the same for a federal prisoner proceeding under § 2255 as for a state prisoner. 394 U.S. at 233 (Black, J., dissenting).

[31] In reversing the Court of Appeals, this Court did not address the lower courts' decision to entertain the successive petition, even though *United States* v. *Jackson*, 390 U.S. 570 (1968), the intervening precedent on which the petitioner based his successive petition for habeas corpus, "established no new test." *North Carolina* v. *Alford*, 400 U.S. at 31.

provide a basis for the courts' examination of a successive habeas corpus petition.

Despite the pronouncement of the court below that *Henry* did not change the law for purposes of retroactivity, *Henry* represents a development in the law that obligated the district court to entertain Wilson's current petition. As a decision of this Court, *Henry* served to develop, clarify, or modify the principles first announced in *Massiah*. *See Henry*, 447 U.S. at 279 (Blackmum and White, JJ., dissenting). The central issue raised by *Henry* (whether there can be "deliberate elicitation" of incriminating statements from the accused without interrogation by the government's agent) had not been resolved by the Court's decisions in *Massiah* v. *United States*, 377 U.S. 201, and *Brewer* v. *Williams*, 430 U.S. 387.

In *Massiah*, decided sixteen years before *Henry*, federal agents had instructed Massiah's co-defendant to engage Massiah in a conversation about the crime. While Massiah and his codefendant spoke, the government agents listened to the defendant's conversation by means of a hidden radio transmitter. *United States* v. *Massiah*, 307 F.2d 62, 66 (2d Cir. 1962), *rev'd*, 377 U.S. 201 (1964). This Court substantially adopted the view of Circuit Judge Hays, dissenting from the decision of the Court of Appeals for the Second Circuit, in which he characterized the activities of the government agents and their informant as "indirect and surreptitious interrogation." 307 F.2d at 72; 377 U.S. at 206.

Brewer involved an even more direct elicitation of incriminating statements from the accused. In that case, a state detective delivered the "Christian burial speech" to a defendant, whom he knew to be deeply religious, in breach of an express agreement with the defendant's counsel that there would be no discussion of the crime in his absence. 430 U.S. at 391-393. In *Brewer*, once again, the Court characterized the conduct at issue as interrogation. 430 U.S. at 400-401.

About one year after the Court rendered its decision in *Brewer*, the Courts of Appeals for the Second and Fourth Circuits, respectively, rendered decisions in *Wilson* and in

Henry. In *Wilson*, the majority of the Second Circuit panel interpreted *Brewer* as requiring a showing that there had been interrogation of the accused:

> The complete absence of interrogation in this case negates the proposition that Wilson's statement was deliberately elicited. According to *Brewer*, constitutional protection would not attach under these circumstances.

Wilson v. *Henderson*, 584 F.2d 1185, 1190 (2d Cir. 1978). In *Henry*, on the other hand, the Fourth Circuit panel majority interpreted *Brewer* as "not restricted to formalized oral interrogation" and held that deliberate elicitation[32] by an undisclosed government informant might be accomplished "by association, by general conversation, or both." *Henry* v. *United States*, 590 F.2d at 547.

This Court's opinion in *Henry* thus altered the scope of the legal inquiry that must be undertaken to determine the issue of deliberate elicitation. In *Henry*, this Court held that the appropriate inquiry under the Sixth Amendment is whether the government intentionally created "a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel." 447 U.S. at 274. Contrary to the decisions of the state trial court, of the federal courts that heard Wilson's first petition for habeas corpus, and of the District Court that heard his current petition, neither actual interrogation nor an overt "affirmative effort . . . to elicit incriminating information" (Cert. Petition, Appendix C, at 28a) from the accused is an essential element of "deliberate elicitation" under *Henry*. This Court explicitly rejected in *Henry* the government's contention that the accused's statements were not deliberately elicited because they were "not the result of any affirmative conduct on the part of Government agents to elicit

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[32] Earlier the court had noted its opinion that " 'interrogation' is a relative term" and that "[a]n undisclosed government agent may effectively 'interrogate' a defendant by simply engaging the defendant in a general conversation and if the response is a confession of guilt, the agent need not make any further more pointed inquiries." 590 F.2d at 547.

evidence." 447 U.S. at 269-272. Indeed, there apparently was no evidence of such affirmative conduct in the record in *Henry*. The informant did not divulge the content of his conversations with Henry; the only evidence as to the informant's conduct was his admission that he had "some conversations with Mr. Henry." 447 U.S. at 271. As in *Wilson*, the informant in *Henry* had been instructed not to interrogate the accused. *Henry* v. *United States*, 590 F.2d at 547.

As the court below correctly pointed out, "the courts considering this matter earlier did not have the benefit of the *Henry* decision as we now do." 742 F.2d at 747. Without it, those courts were adrift, applying the wrong standard and arriving at the wrong conclusion. *Id.* In this situation, the ends of justice required that the federal court entertain Wilson's current application.

2. The Courts That Previously Examined Wilson's Application Were Plainly in Error.

Inasmuch as the components of the ends of justice "cannnot be too finely particularized," *Sanders* v. *United States*, code 373 U.S. at 17, this Court has given the lower federal courts room to decide when a habeas corpus petition should be reviewed under this "prong." Two Courts of Appeals have held that "[t]he ends of justice are not served by refusal to consider the merits of the second application when denial of the first rested on a court's plain errors of law." *Cancino* v. *Craven*, 467 F.2d 1243, 1246 (9th Cir. 1972); *Bass* v. *Wainwright*, 675 F.2d 1204, 1207 (11th Cir. 1982); *see also Johnson* v. *Wainwright*, 702 F.2d 909, 911 (11th Cir. 1983). None of these cases depended on a "change in the law."

Even if the decision in *United States* v. *Henry* represented no change in the law, then it at least reveals the plain error the federal courts committed in their consideration of Wilson's first petition. As more fully explained below (*see infra*, § IIA), *Henry* is an indistinguishable governing precedent deciding the same "ground" that was before the District Court and the Court of Appeals on Wilson's first application. In *Henry*, this Court affirmed the decision of the Court of Appeals for the

Fourth Circuit to grant a writ of habeas corpus. The federal courts that heard Wilson's first petition were overruled by *Henry* and their decisions revealed as plain error. *See infra* § IIA2. Under these circumstances, it was correct for the Court of Appeals to conclude that a review of Wilson's current petition would serve the ends of justice.

3. *Henry* Provides a Differential Basis upon Which to Review Wilson's Current Application.

Although this Court has not previously addressed the question, at least two Courts of Appeals have suggested that there can be a basis, beyond the two examples set out in *Sanders*, for a federal court to entertain a successive habeas corpus petition, if the applicant can offer some "other" element that was not present in the earlier petition. *United States ex rel. Townsend* v. *Twomey*, 452 F.2d at 355 ("Our reading of *Sanders* v. *United States*, *supra*, convinces us of the necessity of some *differential basis* before a district court may in the exercise of sound discretion properly consider the successive habeas corpus petition") (emphasis added); *United States ex rel. Schnitzler* v. *Follette*, 406 F.2d at 321 (there were no new facts nor a "change" in the law, "nor do we see *any other ground* upon which a rehearing" could be justified) (emphasis added).[33] These courts, implicitly recognizing the existence of other potential bases for entertaining a successive petition, undoubtedly rely on the *Sanders* Court's phrase, "some other justification for having failed to raise a crucial point of argument in the prior application." 373 U.S. at 17.

The State cannot gainsay that the decision in *United States* v. *Henry* introduces a new element that was not previously available to Wilson. Even supposing, as the State insists, that upon close examination *Henry* is not determinative of Wilson's claim (Petitioner's Brief at 43-46), *Henry* is unquestionably a development in, or clarification of, the law that has "a direct and

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[33] In each case the Court of Appeals held that the District Court had exceeded its discretion by entertaining a successive application containing no new aspect.

substantial bearing upon the constitutional issues underlying" Wilson's claim. *See Vanhook* v. *Craven*, 419 F.2d 1295, 1296 (9th Cir. 1969). This alone would justify further inquiry into Wilson's case and provide a basis for a federal court to entertain his successive petition. *Smith* v. *Yeager*, 393 U.S. at 125 (where this Court mandated that an evidentiary hearing be held on the second habeas corpus petition when that petition relied on the intervening decision of *Townsend* v. *Sain*, 372 U.S. 293 (1963), which "substantially increased the availability of evidentiary hearings in habeas corpus proceedings").

II. Wilson Is Entitled to Relief under *United States* v. *Henry*

On Wilson's motion to suppress Benny Lee's testimony and notes, the state trial court conducted a hearing pursuant to *People* v. *Huntley*, 15 N.Y.2d 72 (1965) to determine the facts and to rule on Wilson's claim. At the conclusion of the *Huntley* hearing, the state trial court made only one factual finding that it considered determinative, that Lee, the state's informant did not "interrogate" Wilson:

> This Court finds that he, Lee, so acted and, accordingly, no interrogation was conducted by Lee of the defendant at the time they were cellmates.

(J.A. at 63.) What led the court to this finding, and what the court recited prior to announcing this finding, was that Lee asked no direct questions of Wilson. (J.A. at 62.)

On the basis of its finding of "no interrogation," the court concluded that Wilson's statements were "spontaneous" and "voluntary." To support this legal conclusion, the court relied on two decisions of the Court of Appeals of the State of New York: *People* v. *Mirenda*, 23 N.Y.2d 439, 449 (1969); and *People* v. *Kaye*, 25 N.Y.2d 139, 145 (1969). In the former of these two cases, the highest court of New York held that an informant who actually interrogated his cellmate violated the accused's Sixth Amendment rights. In the latter, the court considered the case of a "talkative person in custody" who was clearly not

interrogated, and held that his rights had not been violated.[34] Given these two cases, the state trial court obviously believed that the pivotal question in determining whether to grant the motion was whether Wilson was interrogated or not. It did not consider whether Wilson's being prompted to change his story by an informant who had been instructed to extract information from him, or the government's placing Wilson in a cell overlooking the scene of the crime, or the subtle psychological inducements of proximity to and confidence in his cellmate were factors that caused Wilson to talk to Lee in the absence of his counsel.

The *Henry* Court held, in contrast, that a court must determine from the facts whether they amount to the creation by the government of a situation likely to induce the prisoner to make an inculpatory statement in the absence of his counsel. 447 U.S. at 270-271. The issue raised by Wilson's current habeas corpus petition, whether the government "deliberately elicted" incriminating statements in the absence of his counsel under *Massiah* and *Henry*, involves the application of the law as announced by this Court to the historical facts. In considering this issue and in granting Wilson's petition for habeas corpus, the Court of Appeals did not redetermine or dispute the state court's factual finding concerning Lee's conversations with Wilson. 742 F.2d at 747-748. Rather, on the issue of deliberate elicitation, it refused to accord controlling significance to the absence of "interrogation," an error that every previous court

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[34] The state trial court's reliance on *Kaye* was misplaced since that was a case involving the defendant's rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In *Rhode Island* v. *Innis*, 446 U.S. 291, 300 n. 4 (1980), this Court distinguished the notion of "interrogation" under the Fifth and Sixth Amendments, as follows: ". . . the right to counsel at issue in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the *Miranda* opinion. The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct."

had made when considering the merits of Wilson's Sixth Amendment claim. Moreover, nothing in 28 U.S.C. § 2254(d) precludes the Court of Appeals from drawing the mixed conclusion of law and fact that the State derogated Wilson's right to counsel when it obtained and used at trial the evidence of the secret cellmate informant.

A. *Wilson* Is Indistinguishable from *Henry*.

With the exception of the District Court that considered the current petition, those who have compared *Wilson* with *Henry* have noted that the two cases are indistinguishable. *United States* v. *Henry*, 447 U.S. at 281 (Blackmun and White, JJ., dissenting); *Wilson* v. *Henderson*, 590 F.2d 408, 409 (2d Cir. 1978) (Oakes, J., dissenting); *Henry* v. *United States*, 590 F.2d 544, 553 (4th Cir. 1978) (Russell, J., dissenting) ("Certainly, there can be no distinction drawn between this case and *Wilson*. In fact, if anything, the facts in that case were more favorable to the defendant's claim than are the facts in this case"); *United States* v. *Sampol*, 636 F.2d 621, 637-638 (D.C. Cir. 1980) (allegations "virtually identical").

1. The *Henry* Test Focuses on Whether the Government Created a Situation Likely to Induce the Accused to Make an Inculpatory Statement.

This Court's opinion in *United States* v. *Henry*, 447 U.S. 264, identified the circumstances under which the government violated the accused's Sixth Amendment right to counsel by procuring incriminating statements from him through the use of an undisclosed informant:

> Three factors are important. First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

447 U.S. at 270. The presence of these factors led this Court to hold: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth

Amendment right to counsel." 447 U.S. at 274. This holding and the three underlying factors cited by the *Henry* Court provide the determinative test as to whether the government has deliberately elicited incriminating statements from an indicted, in-custody defendant.

With this test, this Court adopted a totality-of-the-circumstances approach in *Henry*. The *Henry* Court stated:

> An accused speaking to a known Government agent is typically aware that his statements may be used against him. . . . When the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent, the same cannot be said. Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents.

447 U.S. at 273 (distinguishing Fifth from Sixth Amendment concerns). It focused on the circumstances contributing to the likelihood of "elicitation," such as the "powerful psychological inducements to reach for aid when . . . in confinement," the "pressures on the accused," and the "subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." 447 U.S. at 274. The focal point of its analysis was not questioning, but rather the "restrictive nature of the jailhouse setting" and Henry's "confidence in Nichols."

Under the *Henry* test, a court need not, and indeed should not, attempt to pinpoint a single stimulus for the accused's statements.[35] In most cases, it would be impossible to arrive at

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[35] In affirming *Henry*, this Court expressly rejected the government's contention that a finding of interrogation or equivalent verbal conduct by the government or its agent was a necessary element of a violation of the accused's Sixth Amendment right to counsel under its sixteen-year-old decision in *Massiah* v. *United States*, 377 U.S. 201. *See United States* v. *Henry*, 447 U.S. at 271. Certain language ("tantamount to interrogation") in the Court's decision in *Brewer* v. *Williams*, 430 U.S. at 400, had previously raised this issue, which had remained unresolved prior to this Court's *Henry* decision. *Compare Henry* v. *United States*, 590 F.2d at 546-547 (Winter, J.) *with Henry* v. *United States*, 590 F.2d at 548-550 (Russel, J., dissenting).

a reliable determination as to exactly what motivated the informant and what prompted the accused to make incriminating statements to the informant. The Supreme Court therefore adopted an objective test. *See, e.g., United States* v. *Harris*, 738 F.2d 1068, 1071 (9th Cir. 1984). After *Henry*, any inquiry into whether there was deliberate elicitation necessarily reduces to an objective consideration of the steps the government took to create a situation intended to induce the accused to confess, and the likelihood that, under the circumstances, the government's stratagem would have that effect.

2. Under *Henry*, the State Deliberately Elicited Wilson's Inculpatory Statement.

In *Henry*, the government's direct activity consisted of the single act of enlisting a jailhouse informant to obtain information from the accused. In Wilson's case, the government's direct activity was more manipulative. First, Detective Cullen asked Lee whether there was *anything* that Lee could do to help him with the case (J.A. at 36) and specifically requested that Lee "find out" from Wilson the identities of the other two alleged perpetrators of the crime. (J.A. at 24.) Lee had been placed in a cell with a view of the scene of Wilson's alleged crime. Cullen arranged to have Wilson placed in that cell, too. (J.A. at 80.) Lee, concededly acting as Cullen's agent, then undertook to find out not only information about the two unidentified perpetrators of the crime, but also the details of Wilson's supposed participation in the crime. (J.A. at 62.) Lee clearly prompted Wilson to speak and to incriminate himself when Wilson initially offered an exculpatory account. (J.A. at 39, 81.) In *Henry*, there was no more evidence of questioning or "interrogation" by the informant than this in *Wilson*. *Henry* v. *United States*, 590 F.2d at 547.

Lee was not a mere "passive listener" as the State contends. (Petitioner's Brief at 44.) Lee admitted in the record to having conversations with Wilson (which is all the informant did in *Henry*), and from Lee's choice of words, it is obvious that his conversational sallies were provocative. First, Lee testified, "I think I remember telling him that the story wasn't—it didn't sound too good. Things didn't look good for him." (J.A. at 39.)

Second, Lee testified, "Well, I said, look, you better come up with a better story than that because that one doesn't sound too cool to me, that's what I said."[36] (J.A. at 81.) By this provocation, Lee used his position to elicit inculpatory statements from Wilson, and Wilson's remarks were the product of his propinquity to Lee in the cell overlooking the Star Taxicab Garage. *See Wilson* v. *Henderson*, 742 F.2d at 745 ("The instant case cannot be held to be equivalent to one where an informant merely sits back and makes no effort to stimulate conversations with the suspect about the crime charged"). This case therefore does not raise the issue left undecided by this Court in *Henry*, 447 U.S. at 271 n. 9, where a "listening post" is used to overhear the accused's remarks. If anything there is more evidence of "elicitation" in this case than in *Henry*, where the informant was on record only as having "some conversations with Mr. Henry." 447 U.S. at 267. Indeed, the *Henry* Court suggested that simple association between the informant and the accused could constitute deliberate elicitation. 447 U.S. at 269, 273.

The Court of Appeals below reached the conclusion that Wilson's statement had been deliberately elicited based on these facts, all of which were part of the state court record: that Lee was placed in Wilson's cell to function as a surreptitious government informant; that Wilson's cell overlooked the scene of his alleged crime and made him uneasy; and that Lee's conversations with Wilson served to exaggerate Wilson's already-troubled state of mind. In *Henry*, this Court pointed to similar facts that demonstrated that the informant's activities were in direct derogation of Henry's right to counsel with the government's connivance, even though the investigating officer disclaimed asking the informant to take "affirmative steps" to

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[36] The State argues in a footnote (Petitioner's Brief at 41) that the latter testimony should not be considered here because it was not before the state trial court during the *Huntley* hearing. This argument ignores the fact that the second statement is but a paraphrase of the first, which is testimony that unquestionably was before the court during the hearing. (J.A. at 39.) It is not evidence offered as the basis of a claim whose substance was not presented to the state court, as in *Picard* v. *Connor*, 404 U.S. 270 (1971), on which the State relies.

secure information: the informant was in the same cellblock as the accused; he was known to have had a year's experience serving as a government informant; and he was compensated only if he produced useful information. 447 U.S. at 270.

A comparison of the facts of *Wilson* with those of *Henry* shows that Wilson has an even more compelling case. Lee had not one but five years' experience as a government informant; he had given evidence against fellow inmates over one hundred times. (J.A. at 95.) In addition, Wilson and Lee were not total strangers. When he was shown Wilson's picture, Lee had told Detective Cullen that he "had seen [Wilson] around." (J.A. at 78.) Lee thus "had access to [Wilson] and would be able to engage him in conversations without arousing [his] suspicion." 447 U.S. at 270.

Although Lee denied being paid by the State for providing evidence against Wilson, he did admit to receiving "consideration" for his services in *every* other instance in which he served as an informant. (J.A. at 105.) In any event, the issue here is not whether Lee was a "paid informant." In *Henry*, this Court drew attention to the "contingency fee" arrangement the government used there, 447 U.S. at 270 n. 7, because it illustrated that the police created incentives making it likely that the informant would secure an incriminating statement from the accused. There can be no doubt that similar incentives existed in Wilson's case to motivate Lee.[37]

The likely existence of incentives, monetary or otherwise, also shows that the informant's "evidence" is not reliable. *Henry* protects the accused from the government's using against him statements made from motives that render those

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[37] There is reason to believe that Lee did not act out of wholly gratuitous motives. The prosecutor referred to Lee as "the paid police informer." (Tr. at 172.) Lee was a three-time offender awaiting sentencing on a guilty plea to a robbery charge when Detective Cullen enlisted him to serve as an informant. (J.A. at 43.) After providing Cullen with incriminating information against Wilson, Lee unexplainedly acquired the $10,000 bail that had been set in his case, and was freed pending his sentencing hearing. (J.A. at 90.)

statements unreliable. For instance, the accused may exaggerate or even fabricate his involvement in criminal activity in a misplaced effort to impress his fellow inmates. *See, e.g., United States* v. *Sampol*, 636 F.2d at 635 (accused told the secret inmate-informant "that he had plans to take motor boats, load them with explosives and by use of remote control blow up Russian ships in American harbors. He also talked about attempts he had made on the life of Fidel Castro"). The type of statements rendered inadmissible by *Henry* are those most susceptible to distortion due to inaccurate reporting by an informant with an obvious interest in producing incriminating statements to demonstrate his success. *See Wilson* v. *Henderson*, 584 F.2d at 1194 (Oakes, J., dissenting). Because such statements purportedly were uttered by the accused, they are likely to weigh heavily in the determination of guilt. These considerations led the highest court of one state to opine that "[a]nytime a *Massiah* violation occurs, at least in a custodial setting, the validity of the evidence produced will be suspect." *Idaho* v. *LePage*, 102 Idaho 387, 630 P.2d 674, 678, *cert. denied*, 454 U.S. 1057 (1981).

Finally, the *Henry* Court noted "the powerful psychological inducements to reach for aid when a person is in confinement . . . the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." 447 U.S. at 274. If the mere fact of confinement has an inducive effect, a much greater effect must have resulted from Wilson's confinement in a cell with a view of the scene of the terrible crime he was accused of perpetrating. The efficacy of this not-so-"subtle influence" was demonstrated by Wilson's immediate reaction to it: he became apprehensive ("somebody's messing with me") and "very upset" (J.A. at 80, 38) and he spoke about the robbery and shooting on that very first day that he and Lee shared that cell. *Id.* There was thus abundant support in the record for the Court of Appeals to conclude that *Henry* and *Wilson* are indistinguishable.

B. The Court of Appeals Correctly Determined Wilson's Sixth Amendment Claim.

The State's argument on the merits of Wilson's Sixth Amendment claim consists of rewriting the historical facts,[38] then defending those "facts" as presumptively correct. That attempt to distinguish *Henry* incorrectly relies on legal conclusions of the state trial court which in turn relied on legal principles that were rethought five years ago in *Henry*. The Court of Appeals properly deferred to the historical facts found by the state court in accordance with 28 U.S.C. § 2254(d) and gave those facts the appropriate weight under *Henry*. The Court of Appeals did not defer to the legal conclusions or to the mixed determinations of law and fact of the state and other federal courts; § 2254(d) does not require it to do so. "[T]he state courts' view of the merits was not entitled to conclusive weight." *Fay* v. *Noia*, 372 U.S. at 421. This must be especially so when the state court has expressed its view on federal constitutional issues: the courts' conclusion cannot then be *res judicata*. 372 U.S. at 422. In short, "a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game on federal habeas." *Wainwright* v. *Sykes*, 433

[38] The State has strained the record in its zeal to show that the Court of Appeals refound the historical facts, which it did not do. The State principally takes issue with four sentences of the opinion of the Court of Appeals (Petitioner's Brief at 40-41), while ignoring the following facts with fair support in the record, which the Court of Appeals was entitled to rely on: (1) Cullen asked Lee broadly "if there was anything that [he] knew about it or anything that [he] could do to help him with the case" (J.A. at 36), and Lee listened to and took note of "what the defendant had to say with respect to the crime in question" (J.A. at 62), in no way limiting himself to the identity of the unknown suspects; (2) Wilson was unquestionably upset by being moved to the cell with a view of the scene of the crime (J.A. at 38), and that this was surely a factor in the control of the police; (3) Lee prompted and encouraged Wilson to change his story (J.A. at 39); and (4) it took only about two days for Wilson finally to tell an inculpatory version of his story (J.A. at 40) after Lee's expressions of disbelief. (J.A. at 81.)

U.S. 72, 79 (1977); *see also Brown* v. *Allen*, 344 U.S. at 500, 506 (Frankfurter, J.).

1. The Court of Appeals Correctly Applied *Henry* to the Facts of Wilson's Case.

The correct resolution of Wilson's constitutional claim necessarily required a finding of the facts, and an application of the appropriate legal standard to the facts. *See, e.g., Marshall* v. *Lonberger*, 459 U.S. 422, 436-437 (1983); *Sumner* v. *Mata*, 449 U.S. 539, 557 (1981) (Brennan, J., dissenting); *Brewer* v. *Williams*, 430 U.S. at 403; *Brown* v. *Allen*, 344 U.S. at 507 (Frankfurter, J.). There is no dispute that the state trial court found facts, and that the "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators . . . ," *Townsend* v. *Sain*, 372 U.S. at 309 n. 6 (quoting *Brown* v. *Allen*, 344 U.S. at 506 (Frankfurter, J.)), are entitled to a presumption of correctness under § 2254(d). *Sumner* v. *Mata*, 449 U.S. at 550-551.[39]

The disagreement between the Court of Appeals and the state trial court "is not so much over the elemental facts as over the constitutional significance to be attached to them." *Neil* v. *Biggers*, 409 U.S. 188, 193 n. 3 (1972); *see also Townsend* v. *Sain*, 372 U.S. at 314 (when it is "unclear whether the state finder [of fact] applied correct constitutional standards in disposing of the claim" the merits of the claim were not "resolved" in the state hearing); *LaVallee* v. *Delle Rose*, 410 U.S. 690, 694-695 (1973). "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Brown* v. *Allen*, 344 U.S. at 508 (Frankfurter, J.). The primary, historical facts of this case do not themselves dispose of the Sixth Amendment question; they require assess-

[39] This Court should nonetheless undertake its own independent examination of the record when federal constitutional deprivations are alleged; this duty rests on the Court's "solemn responsibility for maintaining the Constitution inviolate." *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959), and cases cited there.

ment under the appropriate constitutional standard, *Marshall* v. *Lonberger*, 459 U.S. at 436-437, which in this case is whether Wilson's statements were deliberately elicited within the meaning of *Henry*. Mixed questions of law and fact involve "the application of legal principals to the historical facts of [the] case." *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 (1980). Thus the constitutional issue raised by Wilson involves a mixed question of law and fact, as the State concedes. (Petitioner's Brief at 37.)

Section 2254(d) does *not* apply when federal courts review state court determinations of mixed questions of law and fact, and such determinations are "open to review on collateral attack in a federal court." *Cuyler* v. *Sullivan*, 446 U.S. at 342; *see also Patton* v. *Yount*, 104 S.Ct. 2885, 2891 (1984).[40] The state trial court's holding, after finding the fact of "no interrogation," and considering what it considered to be the applicable constitutional precedents, was that "the utterances made by defendant were unsolicited, and voluntarily made and did not violate the defendant's Constitutional rights. . . ." (J.A. at 63.) After considering the same factual record, the Court of Appeals arrived at this mixed determination of law and fact:

> Since the government intentionally staged the scene that induced Wilson to make the inculpatory statements, it may be held to have deliberately elicited them in violation of Wilson's Sixth Amendment right to counsel.

742 F.2d at 745. The difference between these two holdings springs from an interpretation of the facts in light of the appropriate law. The decision of the Court of Appeals does not, despite the State's strenuous exegesis of conflicting nuances (Petitioner's Brief at 45-48), depend on a subversion of the findings of the historical facts found by the state trial court. "The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary." *Townsend* v. *Sain*, 372 U.S. at 312.

The determinative issue here after *Henry*, whether the government created a situation likely to induce Wilson to make

[40] This rule has invariably been followed by the Courts of Appeals. *See*, Project, *Fourteenth Annual Review of Criminal Procedure*, 73 Geo. L.J. 751, 809 n. 3304 (1984), and numerous cases cited there.

incriminating statements in the absence of counsel, is analogous to other mixed determinations of law and fact in the Sixth Amendment context, which this Court has held to be beyond the presumption of § 2254(d). *Cuyler* v. *Sullivan*, 446 U.S. at 342; *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2070 (1984). While it "will not always be easy to separate questions of 'fact' from 'mixed questions of law and fact' for § 2254(d) purposes," *Wainwright* v. *Witt*, 105 S.Ct. 844, 855 (1985), the issue of deliberate elicitation has all the hallmarks of the latter.

In *Cuyler* v. *Sullivan*, this Court held that the question of the adequacy of representation by the accused's lawyers, due to the conflict arising from multiple representation, "is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case." 446 U.S. at 342. In *Strickland* v. *Washington*, this Court held that "a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d) . . . . Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact." 104 S.Ct. at 2070. The answers to these mixed questions resolve Sixth Amendment issues, which are comparable to those in *Henry* and in *Wilson*. They are also comparable to the Sixth Amendment issues raised by the right-to-counsel example given by Justice Frankfurter in *Brown* v. *Allen*, "[w]here the ascertainment of the historical facts does not dispose of the claim, but calls for interpretation of the legal significance of such facts." 344 U.S. at 507. There, Justice Frankfurter observed that whether the accused had counsel, or whether counsel was present, are historical facts, but whether the accused's right to counsel was denied is a mixed question. *Id.*

Even if the state trial court's conclusion regarding "voluntariness" is a historical fact,[41] the Court of Appeals acted

[41] To the contrary, the question of voluntariness is one generally thought to be a mixed question of law and fact. *Gunsby* v. *Wainwright*, 596 F.2d 654, 655 (5th Cir.), *cert. denied*, 444 U.S. 946 (1979);

within its authority by assigning weight or legal significance to the facts under *Henry*. *Cuyler* v. *Sullivan*, 446 U.S. at 342; *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982) (per curiam) ("In deciding this [mixed] question, the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard"); *see also*, *Frank* v. *Magnum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting). Indeed in *Henry*, the government characterized the accused's statements as "voluntary," 447 U.S. at 269, and the Court assigned no weight to this characterization in the Sixth Amendment right-to-counsel context. 447 U.S. at 273. If the state trial court regarded "voluntariness" (along with the absence of interrogation) as a determinative historical fact, it applied an erroneous legal test under *Henry*. *See supra* § IB1. In these circumstances, the federal court, reviewing Wilson's petition for habeas corpus would have to conclude "that the merits of the factual dispute were not resolved in the State court hearing." 28 U.S.C. § 2254(d)(1); *Townsend* v. *Sain*, 372 U.S. at 313 (remarking on the factors later codified in § 2254(d)).[42]

"The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of consti-

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see also, *Marshall* v. *Lonberger*, 459 U.S. at 436-437. The State also relies heavily (Petitioner's Brief at 31-32) on the state trial court's use of the words "spontaneous" and "unsolicited." From a close reading of that court's decision, it is apparent that these words, like the word "voluntary," do not refer to historical fact, but are conclusions of law and fact springing from the finding of "no interrogation" and resolving the question of "whether or not what defendant said in Lee's presence is to be suppressed." (J.A. at 63.)

[42] *Procunier* v. *Atchley*, 400 U.S. 446, 453 n. 6 (1970) ("Congress in 1966 amended 28 U.S.C. § 2254 . . . so as substantially to codify most of the habeas corpus criteria set out in *Townsend* v. *Sain*"); *see also* *Wainwright* v. *Sykes*, 433 U.S. at 80. The decision of the Court of Appeals must rest on one of the subsections of § 2254(d) only if findings of historical fact of the Court of Appeals were "at odds with" those of the state trial court. *Sumner* v. *Mata*, 455 U.S. at 598. As the Court of Appeals did not attempt to find the facts, but only recited them as they appear in the record, 742 F.2d at 742, this is not the case.

tutional rights and yet (erroneously) concluded that relief should be denied." *Townsend* v. *Sain*, 372 U.S. at 316. Thus, if the facts the State points to (Petitioner's Brief at 43-46) were determinative to the state trial court, that court's conclusion was subject to reexamination by the federal court on a writ of habeas corpus.

2. The Court of Appeals Acted within the Proper Scope of Review.

The conclusions of the district judge and the prior panel of the Court of Appeals for the Second Circuit, which, the State argues, should be binding on the panel that heard Wilson's current petition (Petitioner's Brief at 31-33), are irrelevant here. *Neil* v. *Biggers*, 409 U.S. at 193 n.3. First, the conclusion of the District Court was open to review by the appellate panel. 28 U.S.C. § 2253. An appellate court is free to substitute its own independent judgment for that of a district court and to correct any errors of law without application of the clearly erroneous test. *See Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982) (in the context of Fed. R. Civ. P. 52(a), the standard for review of questions of fact, mixed questions, and questions of law); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n. 15 (1982). Significantly, neither District Court that considered Wilson's claim held a factual hearing or observed any witnesses; they based their interpretation of the facts on a transcript of the state court hearing. The panel below was as competent as those courts to review the record. *See Neil* v. *Biggers*, 409 U.S. at 193 n. 3. At least there was no reason to accord the District Court's decision with the special weight given to the trier of fact that has a unique opportunity to evaluate the credibility of witnesses and to weigh the evidence. *Id.* Furthermore, the Court of Appeals had a duty to exercise its independent judgment when the lower court, applying the wrong legal standard, focused on improper factors in reaching its decision. *Neil* v. *Biggers*, 409 U.S. at 200; *see Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 1960 (1984) (Fed. R. Civ. P. 52(a) does not inhibit the power of the appellate court to correct errors of law that may infect mixed finding of law and fact).

Finally, since the law to be applied is that which is in effect at the time the appeals court renders its decision, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-282 (1969), the Court of Appeals properly determined Wilson's constitutional claim without reference to any "law of the case" of the appellate panel that examined Wilson's first petition before *Henry* was decided.[43] *Davis* v. *United States*, 417 U.S. 333, 342 (1974).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

PHILIP S. WEBER
520 Madison Avenue
New York, New York 10022
(212) 888-6550
(Counsel of Record)

IDA C. WURCZINGER
3701 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 363-1761

Counsel for Respondent
JOSEPH ALLAN WILSON

Of Counsel:
JAMES J. NEATH
231 South LaSalle Street
Chicago, Illinois 60604

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[43] The view of the prior panel of the Court of Appeals rightly has no bearing on the second panel's exercise of legal judgment because it had no *res judicata* effect on Wilson's subsequent petition. *Sanders*, 373 U.S. at 8; *see supra*, § IA.